Mohd Zulkifli bin Md Ridzuan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–14–01 OF 2012
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
25 APRIL 2013

Criminal Procedure — Appeal — Principles of appellate intervention — Accused charged with trafficking 2,532g — Assessment of quality of evidence — Whether evidence on record justified conviction — Whether judgment of trial judge reflected reasonable view of evidence — Whether appellate intervention should be warranted — Merits of appeal cannabis — Dangerous Drugs Act 1952 s 39B(1)(a)

In the present appeal, the appellant was charged with trafficking in 2,532g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. Acting upon information received from a source, an agent provocateur ('SP2') contacted the accused by phone and they agreed to meet at a restaurant. The accused arrived on a motorcycle and proceeded to take SP2 to the motorcycle where the drugs were kept and showed them to him. Confident that they were indeed drugs, SP2 signaled for the ambush party to jump into action. The accused was arrested. In his defence, the drugs belonged to a person called 'Suri' who had earlier borrowed the appellant's motorcycle. It was suggested by the appellant that Suri left the incriminating drugs at the motorcycle. After undertaking a maximum evaluation of the evidence, the High Court concluded that the prosecution had proven the case beyond reasonable doubt. Dissatisfied, the appellant filed the instant appeal. The Court of Appeal judge pointed out that counsel for the appellant did not file any written submission.

Held, dismissing the appeal:

(1) It was in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justified a conviction. In so doing, if the court ordered an acquittal or conviction it could not be set aside by the appellate court unless it recorded a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. The judgment of the trial judge reflected a reasonable view of the evidence on record according to law. Appellate intervention was not warranted and the appeal had no merit (see paras 10–11).

(2) The criminal bar must not accept any brief in capital punishment cases if they have no time to prepare for the case and/or appropriate submission to assist the court in the administration of criminal justice. The court took note of such conduct with concern and disappointment. Bar Council ought to educate its members for the need to file written

submission at the earliest opportunity and in appropriate cases where there was a breach, must initiate disciplinary action without fear or favour. The conduct complained of might amount to breach of the Legal Profession (Practice and Etiquette) Rules 1978 and in appropriate cases, advocates might be liable for disciplinary action (see para 2).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu telah dituduh mengedar 2,532g kanabis, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Bertindak atas matlumat yang diterima daripada sumber, ejen perangkap ('SP2') berhubung dengan tertuduh melalui telefon dan mereka bersetuju untuk berjumpa di restoran. Tertuduh tiba dengan motosikal dan terus membawa SP2 ke motosikal di mana dadah disimpan dan menunjukkannya kepada dia. Yakin yang ianya memang adalah dadah, SP2 memberi isyarat kepada pasukan serang hendap untuk bertindak. Tertuduh ditangkap. Dalam pembelaannya, dadah tersebut dimiliki oleh seorang yang bernama 'Suri' yang sebelumnya meminjam motosikal perayu. Ia dicadangkan oleh perayu bahawa Suri meninggalkan dadah tersebut di motosikal tersebut. Selepas mengambil kira penilaian maksimum keterangan, Mahkamah Tinggi memutuskan bahawa pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah. Tidak berpuas hati, perayu memfailkan rayuan ini. Hakim Mahkamah Rayuan menunjukkan bahawa peguam kepada perayu tidak memfailkan apa-apa hujahan bertulis.

Diputuskan, menolak rayuan:

(1) Adalah di dalam tangan pencuba fakta untuk menilai kualiti keterangan untuk menentukan sama ada keterangan atas rekod menjustifikasikan sabitan. Dalam berbuat sedemikian, jika mahkamah memerintahkan pembebasan atau sabitan ia tidak dapat diketepikan oleh mahkamah rayuan kecuali ia merekodkan dapatan bahawa pandangan yang diambil oleh mahkamah perbicaraan bukan pandangan yang mungkin munasabah terhadap keterangan atas rekod. Penghakiman hakim perbicaraan mencerminkan pandangan munasabah keterangan atas rekod mengikut undang-undang. Campur tangan mahkamah rayuan tidak wajar dan rayuan tidak mempunyai merit (lihat perenggan 10–11).

(2) Majlis jenayah mesti tidak menerima apa-apa brief dalam kes-kes hukuman mati jika mereka tiada masa untuk menyediakan untuk kes tersebut dan/atau hujahan yang wajar untuk membantu mahkamah dalam pentadbiran keadilan jenayah. Mahkamah mengambil kira tindakan sedemikian dengan bimbang dan kecewa. Majlis Peguam patut mengajar ahli-ahlinya untuk keperluan memfailkan hujahan bertulis pada peluang terawal sekali dan dalam kes-kes yang sesuai di mana terdapat pelanggaran, mesti memulakan tindakan disiplin tanpa rasa takut atau memilih. Tindakan yang diadukan mungkin merupakan

pelanggaran Peraturan-Peraturan Profesion Guaman (Amalan dan Etika) 1978 dan dalam kes-kes yang sesuai, peguambela-peguambela mungkin boleh didenda dengan tindakan disiplin (lihat perenggan 2).]

Notes

For a case on principles of appellate intervention, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 696.

Cases referred to

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (folld)
Pramod Mandal v State of Bihar (SC) [2004] 4 LRI 24, SC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a), (2)
Legal Profession (Practice and Etiquette) Rules 1978

Appeal from: Suit No 45A-28–06 of 2011 (High Court, Alor Setar)

Yagoo Subramaniam (Yagoo & Associates) for the appellant.
Andi Razalijaya bin A Dadi (Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's/accused appeal, came up for hearing on 11 March 2013 and upon hearing we dismissed it on the same day. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the judgment and approved the same. This is our judgment.

[2] In the instant case learned counsel for the appellant did not file any written submission. Such a conduct is very unusual in appeal cases and more so in capital punishment cases. In our view the criminal bar must not accept any brief in capital punishment cases if they have no time to prepare for the case and/or appropriate submission to assist the court in the administration of criminal justice. The court takes note of such conduct with concern and disappointment. Bar Council ought to educate its members for the need to file written submission at the earliest opportunity, and in appropriate cases where there is a breach must initiate disciplinary action without fear or favour. The conduct complained of may amount to breach of the Legal Profession (Practice and Etiquette Rules 1978) and in appropriate case advocates may be liable for disciplinary action.

[3] It must be stated here that at times we note that assigned counsel have not even met the appellant/accused to take appropriate instructions. And we have seen counsel confessing at that date of hearing that it is the first time they are meeting the appellant and stating that they are ready to proceed. It is quite shocking and is not a healthy trend in the administration of criminal justice, that too in capital punishment cases.

[4] Notwithstanding the absence of the written submission by learned counsel we have taken upon ourselves to scrutinise the evidence in meticulous detail and the findings of the learned judge and we find no reason to warrant appellate intervention.

[5] The appellant has filed a lengthy memorandum of appeal relating to finding of facts. Learned deputy public prosecutor has filed a detailed submission in meticulous detail rebutting all the issues raised in the petition of appeal with appropriate reference to the evidence and finding of the learned judge. It is trite that the finding of facts of the trial judge will not be ordinarily disturbed as long as the court strictly follows *Radhi*'s directions and the maximum evaluation and beyond reasonable doubt at the end of the defence case, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888 (20 March 2013)).

BRIEF FACTS

[6] The appellant was charged for trafficking dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. The charge reads as follows:

> Bahawa kamu pada 19hb Ogos 2010, jam lebih kurang 9.30 malam di hadapan gerai Rumah Makan Intan Penjaja Taman Cengkok Manis, Lunas di dalam daerah Kulim, di dalam Negeri Kedah Darul Aman, telah didapati memperedar dadah berbahaya iaitu Cannabis seberat 2532 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[7] In the instant case the police have obtained information from a source. One police officer, SP2 was appointed as agent provocateur by the investigating officer SP7. After contacting the accused by phone, SP2 met the accused at an agreed restaurant. SP7 had observed the accused arriving in the motorcycle and was going to the restaurant where the accused met SP2 to sell the drugs. Subsequently, the accused took SP2 to the motorcycle where the drugs were kept and showed him the drugs. SP2 after seeing the drugs gave the signal to SP7 and team to make the arrest. The accused was arrested red handed and the

drugs recovered. It was the accused's story that the drug belonged to a person called 'Suri'. And the accused relied on his caution statement. The caution statement, inter alia, reads as follows:

> Saya tak pernah terlibat dengan pengedaran dadah, pada 19/8/2010 saya pergi ke tempat kerja di Gelugor dan balik pada pukul 4 petang, kemudian saya telah dipanggil oleh seorang kawan saya yang saya panggil SURI yang juga penyelia tempat kerja saya. SURI ni sudah berkahwin dan berumur dalam 34 tahun. Saya kenal dia sejak sebelum kerja disini lagi tapi betul-betul rapat selepas bekerja dan dia yang recommend saya kerja ni. SURI beritahu saya untuk teman dia pergi ke Kulim kerana road tax m/sikal dia mati, untuk jumpa kawan mengenai kerja tapi tak tau kerja apa. Dia ajak pergi selepas buka puasa, jadi saya balik rumah dulu. Kami janji jumpa balik di tempat kerja. Lebih kurang pukul 7.50 malam saya sampai di tempat kerja kami dan tunggu. SURI sampai 15 minit kemudian bawa m/sikal dia yang road tax mati tu. Sebelum kami bergerak ke Kulim dia telah pinjam m/sikal saya dan pergi Kampung Jelutong yang terletak di belakang power station tempat kerja kami, dalam 20 minit kemudian SURI datang balik dan saya perasan ada satu beg warna kuning/oren dalam raga motor saya dan ditutup dan baju hujan saya. Saya tak syak apa-apa. Dalam keadaan tergesa-gesa SURI terus ajak saya pergi ke Kulim. Jadi kami bergerak ke Kulim dengan m/sikal kuning iaitu m/sikal jenis EX5 warna hitam no. pendaftaran PDM 1430 yang ditunggang oleh SURI, saya duduk belakang. Kami bertolak lebih kurang pukul 8.30 malam ke Kulim ikut highway BKE. Dalam perjalanan ke Kulim kami tak berhenti di mana-mana dan terus sampai di Kulim, SURI beritahu kawannya tunggu di Lunas, saya ikut saja. Kami sampai di Kulim dalam pukul 9 malam, malam itu hujan mau turun. Kemudian SURI telah berhenti di sebuah kedai makan Tom Yam berhampiran stesen minyak Petronas. Saya tak berapa pasti kawasan sini kerana saya tak biasa di Kulim. Di kedai tersebut kami telah duduk minum dalam 2-3 minit dan SURI ada terima panggilan telefon dan dia beritahu nak keluar pegi ambil kawan, jadi SURI keluar saya tunggu di situ, SURI keluar bawa m/sikal yang kami naik tadi. Selepas 10-15 minit SURI balik semula ke kedai itu dan dia beritahu saya untuk tunggu sebentar tapi kunci motor dia tak serah pada saya lagi dan selepas SURI berjalan keluar dari kedai tersebut dalam 2-3 minit datang beberapa orang lelaki dan pegang saya telah bawa saya pergi ke motorsikal saya dan polis ambil beg yang ada dalam raga motor dan gari saya, bawa saya ke IPD Kulim, jadi saya tau la depa polis. Semasa di IPD Kulim polis baru tunjuk isi beg tadi, saya Nampak 2 1/2 ketul ganja. Saya tak tahu mengenai barang tapi saya tak bawa beg itu, selepas SURI pakai motor saya baru beg tu ada. Kemudian saya telah buat urin test dan polis sangkut ganja. Selepas dari itu saya tak Nampak SURI lagi. Kini saya ditahan di lokap Kulim sehingga sekarang. Barang-barang yang polis rampas ialah m/sikal saya, seluar yang saya pakai, handphone dan kad pengenalan dan wallet saya.

[8] The learned trial judge in her 29 page judgment had gone through the caution statement as well as the defence evidence in meticulous detail and had assessed the evidence in totality strictly following the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, where it was stated:

Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 LNS 82 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the judge but rather the actual application of the test to the facts of the case. In this case, the learned judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on a balance that the presumption of possession under s 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

[9] The learned trial judge was also careful to undertake a maximum evaluation of the evidence before concluding that the prosecution has proven the case beyond reasonable doubt.

[10] It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar (SC)* [2004] 4 LRI 24; *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855. We are satisfied that the judgment of the trial judge reflects a reasonable view of the evidence on record according to law.

[11] As stated earlier we are of the considered view that the appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

[12] We hereby order so.

Appeal dismissed.

Reported by Afiq Mohamad Noor